**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 618 of 1995**

**For Approval and Signature:**

**HON'BLE MR.JUSTICE S.R.BRAHMBHATT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**STATE OF GUJARAT - Appellant(s)**

**Versus**

**SHADULBHAI CHOTHHUBHAI - Opponent(s)**

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**Appearance :**
MR. K.C. SHAH, LD. APP for Petitioner.

MR DK MODI for Respondent No(s).: 1.
MR MD MODI for Respondent No(s).: 1.
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**CORAM : HON'BLE MR.JUSTICE S.R.BRAHMBHATT**

**Date : 02/08/2005**

**ORAL JUDGMENT**

1.The appellant – State of Gujarat has preferred this Criminal Appeal under section 378 of the Code of Criminal Procedure, 1973, challenging the order of acquittal dated 7-2-1995 recorded by learned Chief Judicial Magistrate, Bharuch, in Criminal Case No. 22673 of 1993, acquitting the present respondent for the offence under Section 7(i), 16(i)(A) (I) of the Food Adulteration Act, 1954. This Court (Coram: M.R. Calla, J) vide order dated 7-8-1996 was pleased to grant leave to appeal and admitted the appeal.

2. The case of the appellant in short is that the original complainant – Food Inspector visited the shop of the accused on 3-6-1993 at about 12.00 O' Clock in the city of Bharuch for collecting sample of food article for sending it for analysis. The complainant purchased 750 grams of curd from the accused in presence of the panch witness and the same was divided into 3 equal parts and collected in clean, odorless, dried bottles. The preservative formalin was added as prescribed in law and the

bottles were thereafter tightly closed so as to prevent any moisture or air being creeping in. After wrapping and labelling it as per the requirements of law, the Local Health Authority was intimated about collection of sample and it being sent to the Public Analyst. Before that, panchnama was drawn at the place of accused and the notice under Rule 12 in Form-VI was issued, notifying that the sample food article was collected and purchased for sending it for analysis. The cash memo for purchasing the food sample article was also signed by the concerned accused. Notice containing the signature of the complainant and cash memo have been placed on record. Local Health Authority was intimated on 3-6-1993 that the sample was being sent for public analysis on next day i.e. 4-6-1993. On receipt of report form Public Analyst that the sample curd did not conform to the standards laid down under the provisions of Prevention of Food Adulteration Rules, 1955 (herein after referred to as the 'Rules'), necessary papers were prepared for submitting to the Local Health Authority for

obtaining his consent along with the report of the Public Analyst. On receipt of the consent from Local Health Authority the complaint came to be lodged. The notice as envisaged under section 13(2) was also issued to the accused so as to enable him to avail an opportunity of sending remaining sample for further analysis to the Central Food Laboratory. After initial examination of the matter, the trial court recorded plea of denial of the accused and proceeded further in the matter. The trial court has framed 4 issues, namely (1) whether the prosecution proves beyond doubt that Shri. M.G. Shaikh, Food Inspector, Bharuch, purchased sample food article (curd) from the accused on 3-6-1993 at 12.00 O' clock for sending it for analysis ?; (2) whether the prosecution proves beyond doubt that the concerned Food Inspector has collected and purchased sample food article on 3-6-1993 at 12.00 O' clock from the accused in compliance with the provisions of Prevention of Food Adulteration Act, 1954 ?; (3) whether the prosecution proves beyond doubt that

the food sample purchased by the Food Inspector on 3-6-1993 was adulterated and not in conformity with the standards laid down under the Rules ?; (4) Whether the accused have committed any offence under section 7(i) read with section 16(i) (A) (1) of the Prevention of Food Adulteration Act, 1954 ?; (5) what order ?.

Learned Magistrate has answered in affirmative in respect of Issue No.1, and so far as Issues No.2 to 4 are concerned, he has answered the said issues in negative and 5th issue, as per his order.

3. After recording reasons in detail learned Magistrate has come to the conclusion that the prosecution has not successfully proved the case and therefore, he has acquitted the accused of the charges levelled against him under impugned order dated 7-2-1995.

4. Shri. K.C. Shah, learned APP on behalf of the appellant has strenuously urged that the reasoning

indicated by learned Magistrate is erroneous and therefore, the resultant conclusion of acquittal recorded in the impugned order dated 7-2-1995 deserves to be quashed and set aside. Shri. Shah has further submitted that, as the adulteration is proved the accused ought to have been convicted and appropriate sentence ought to have been awarded. Shri. Shah has further submitted that the report of the Public Analyst (exhibit-19) conclusively indicate that the sample food in question did not conform to the standards laid down under the provisions of the Rules and, therefore, the findings of the learned Magistrate deserves to be reversed and the accused deserved to be convicted and be imposed appropriate punishment. Shri. Shah, learned APP has contended that the trial court has erroneously came to the conclusion that due to infirmity in collecting the sample the prosecution has failed in proving the case beyond doubt. Shri. Shah has submitted that learned trial court has misdirected itself in coming to the conclusion that the accused deserves to be acquitted. Shri. Shah

has submitted that the trial court has erroneously taken judicial note of the fact that the milk which is made out of dahi i.e. Curd out of toned milk and milk made out of other milk would vary in its fats contents. Shri. Shah has further submitted that the trial court has believed that complainant Food Inspector has not observed the rules while collecting sample and storing it and adding requisite amount of preservative i.e. formalin. It is submitted by Shri. Shah that in absence of any clarification with regard to the type of curd sold, it is not open to the trial court to hold against the prosecution that curd was made out of toned milk as alleged. Shri. Shah has also submitted that the contention that the curd sample which was collected was not collected after churning the entire quantity of curd that was lying in the shop of the accused. Shri. Shah has submitted that the requirement of section 11 does not specifically make it mandatory upon the Food Inspector to churn food article like dahi i.e., curd before the same is taken for sample analysis. Shri. Shah has

submitted that in absence of any specific provision indicating method for collecting sample of a particular food item, compliance of section 11 is evident on the record. In view of this, the acquittal recorded deserves to be quashed and set aside. Shri. Shah has further submitted relying upon he Apex Court decision in case of STATE OF KERALA etc. etc. Vs. ALASERRY MOHAMMED etc. etc. reported in 1978 (1) FAC, pg. 145. Shri. Shah has relied upon the observations of the Apex Court in para-13 of the judgment in support of this contention that there is no requirement of churning the food article before the sample is taken. Shri. Shah however could not effectively point out as to how the judgment cited at the Bar in favour of the respondent in case of VALLABHBHAI POPATBHAI Vs. STATE OF GUJARAT & ANR., reported in G.L.R. 2005(2)pg. 1518, is not applicable perforce to the present case. Shri. Shah, however, has submitted that the findings and reasonings of the trial court on the face of it seems to be erroneous, and therefore, relying upon the report of the Food

Analyst indicating that the sample food article did not conform to the standards laid down under the Rules, the conviction ought to have been recorded with appropriate punishment. In view of this, he submitted that the appeal deserves to be allowed and the accused – respondent deserves to be convicted with appropriate sentence.

5. Shri. Modi, learned counsel appearing on behalf of the respondent – original accused has submitted that the order of acquittal calls for no interference in the acquittal appeal. He has submitted that the reasonings recorded by the trial court would go to show that the order of acquittal deserves to be sustained. Shri. Modi has submitted that in acquittal appeal it was always open to the respondent accused to support the order of acquittal on the grounds and reasonings different that the one indicated by the trial court. In the instant case, he submitted that, independent of the trial court's reasonings, it can well be established from the record that the prosecution

has failed in proving guilt of the accused beyond reasonable doubt. He invited this Court's attention to the notice under Rule-12, cash memo and the report which show that there is no specific mention about the type of curd sold to the Food Inspector. He submitted that there is pointed suggestion made in the cross examination to the Food Inspector that the Food Inspector was informed time & again by the vendor that the food sample i.e., curd purchased by him was made out of toned milk and not made out of buffalo milk. In view of this the food article ought to have been examined by the standards laid down for the toned milk. He submits that the food article did meet the standards for the curd made out of toned milk and in view of the pointed suggestion made to the Food Inspector, a conclusion can well be drawn that the prosecution has not established beyond doubt that the sample food article was not made out of toned milk. Shri. Modi has further submitted that the Food Inspector while dispatching the food article for public analysis was under duty bound to send an intimation to the

Local Health Authority as envisaged under section 11 (1)(c)(i) of the Prevention of Food Adulteration Act, 1954 (herein after referred to as the 'Act') He has pointed out from the communication addressed by the Food Inspector dated 3-6-1993 stating that one portion of sample article is being sent to the Public Analyst on 4-6-1993, meaning thereby the intimation is sent in advance of the food article in question being sent on next day to the public Analyst. Shri. Modi has relied upon a decision of this Court in case of STATE OF GUJARAT Vs. RAJESH D. THAKKAR & ORS., reported in 2002 (1) FAC Pg. 7, wherein it was held that provisions of Rule 11 (1)(c)(i) of the Act are mandatory and failure on the part of the prosecution to show intimation to the Local Health Authority of sending sample to the Public Analyst amounts to vitiating the case, and therefore, the acquittal recorded need not be disturbed. He has relied upon one more judgment of this Court in case of STATE OF GUJARAT Vs. PATEL AMBALAL REVABHAI, reported in II (1996) CCR pg. 362, holding that the provisions of Section 11 (1)

(c) being mandatory and as the compliance with this provision was not proved by the prosecution, the acquittal appeal be dismissed. It is important to note at this stage that Shri. Modi has not been in a position to point out clearly non compliance with Section 11 (1)(c) of the Act. On the contrary the intimation dated 3-6-1993 from the Food Inspector to the Local Health Authority indicates that the intimation was given to the Local Health Authority in advance and in my view, this amounts to substantial compliance with provisions of the Act and, therefore, this submission of Shri. Modi does not help the respondent-accused.

6. Shri. Modi has further contended that the deposition of the Food Inspector, the panchnama, and the deposition of the panch witness and the material on record would show that the Food Inspector while collecting sample did not take enough care to see to it that the sample article is taken out of churning the entire quantity of 5-00 Kg. Curd which was lying in the shop of the

accused. Shri. Modi has submitted that when all food articles like curd, milk, etc. is being purchased for sending it for analysis, then, it is the requirement of Rule that same need to be properly churned so as to make it homogeneous. In support of this contention he has relied upon the judgment of this Court in case of Vallabhbhai Popatbhai Vs. State of Gujarat & Anr. (supra). He submitted that this Court has in question of the very food article i.e., curd held that the requirement of churning and making the article homogeneous is an essential requirement for bringing home the charge. In the instant case there is no whisper anywhere on the record to suggest that the food article was churned or made homogeneous. He has invited this Court's attention to the cross examination of the complainant wherein it was pointedly asked that the food article was not collected after churning the entire quantity of 5-00 kg., curd as alleged. He submitted that the mandatory requirement is not fulfilled and therefore on that count also the acquittal at this

stage does not call for any interference by this Court. Shri. Shah, learned APP, as it is stated herein above, could not effectively controvert the proposition. However, he maintained his submission that the requirement of churning not being specifically embedded in the Rules, the same can not be press in to service for maintaining the order of acquittal.

7. This Court has carefully examined the record and heard learned counsels at length. The submission of Shri. Modi in respect of non compliance of Rule 11 (1)(c)(i) seems to be of no avail to the accused as it is stated herein above. The next submission of Shri. Modi that the food article sold to the Food Inspector was made out of toned milk and therefore it was required to be tested with the standards prescribed for the toned milk and as the same is meeting with the standards of toned milk, the acquittal deserves to be sustained, appears to be well founded. The sample food article dahi (curd) finds itself mentioned at Item A: 11.02.04 in

Appendix-B to the Rules. Same deserves to be set out as under:

> **"A:11.02.04- "Dahi or curd"** means the product obtained from pasteurized or boiled milk by souring, natural or otherwise, by a harmless lactic acid or other bacterial culture. Dahi may contain added cane sugar. Dahi shall have the same minimum percentage of milk-fat and milk solids non-fat as the milk from which it is prepared.
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> Where dahi or curd [***] is sold or offered for sale without any indication of class of milk, the standards prescribed for dahi prepared from buffalo milk shall apply [Milk solids may also be used in preparation of this product.]"

8. A submission can well be envisaged that where there is absence of any indication about the type of milk used for making curd the sample curd is to

be treated to be made of buffalo milk only and therefore, failure on the part of the vendor to indicate that the sample food article was not made of buffalo milk would help the case of the prosecution for testing the food article by the standards prescribed for buffalo milk. However, it requires to be borne-in-mind that time and again in the cross examination and in the testimony of the panch witness it has been categorically mentioned that all along the vendor had requested the Food Inspector to mention that he has taken the food article of dahi which was made out of toned milk. The fact remains that the accused himself has not stepped into the box for bringing this fact. But this suggestion time and again deserves to be viewed in its proper perspective. The panch witness's deposition do not inspire much confidence of this Court. Few things had emerged from the deposition of the panch witness and the panchnama that it is stated that the list was there indicating different prices of curd and in absence of any specific denial by the Food Inspector about

the price list of possibility of vendor showing that this dahi sample was not made of toned milk can not be rule out.

9. The contention of Shri. Modi that food article dahi was required to be churned before it was purchased by Food Inspector seems to be strongest contention for maintaining and sustaining the order of acquittal. As it is stated herein above this Court has in Criminal Revision Application No. 97 of 2004 in terms held that the food article curd was required to be churned before it was taken for sample food analysis is sufficient to dispose of this appeal as it would be applicable with all its force to the facts of the present case. The prosecution has failed by leading any positive evidence that the food article was made homogeneous before the sample was purchased and in view of this, the doubt created by learned counsel for the respondents deserves to be sustained and the benefit thereof deserves to be granted to the accused for sustaining the order of acquittal in

the present appeal.

10. In the result, this Court, though may not be in complete agreement with the reasonings of the trial court, is of the view that, the order of acquittal dated 7-2-1995 passed in Criminal Case No. 22673 of 1993 need not be interfered with and hence the appeal deserves to be dismissed and is dismissed accordingly. Bail bond, if any, shall stand cancelled.

[ S.R. BRAHMBHATT, J ]

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